JONES WALKER

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WHAT ELECTION RESULTS MEAN FOR EMPLOYERS

The Republican takeover of the U.S. House of Representatives and the Democrats' loss of their super-majority in the U.S. Senate in the November mid-term elections had employers dancing in the streets, but the celebration may be short-lived. To be sure, the election results will have a significant impact on the legislative agenda of President Obama, his Administration, and the Democrats in Congress. As the President himself confessed on Election Day morning, "My whole agenda is at risk." It might be easy to conclude from what the President called a "shellacking" on Election Night that his agenda has been completely derailed; but that would be a mistake.

Expect Obama Administration to Shift Focus from Legislation to Regulation

While the President and his party no longer have the votes to enact major legislative changes, they still control the Executive branch of government and all its regulatory agencies. President Obama is now expected to tack toward the middle in his dealings with Congress, and it is anticipated that his Administration will shift its focus to achieving through regulatory action as much as it can of what it no longer can achieve legislatively.

What does this mean for employers? Among other things, more regulatory oversight, stricter compliance rules, more compliance reviews, and more aggressive enforcement action. Let us first take a look at what is left of the President's legislative agenda and then see what employers might expect on the regulatory side.

What's Left of Democrats' Employment Law Agenda?

At the top of the President's and Democrats' wish list for labor and employment are the so-called Employee Free Choice Act (EFCA) and Paycheck Fairness Act (PFA). EFCA would make it easier for unions to organize employers and also force employers into federal mediation and arbitration when they are unable to accept unions' contract demands. The PFA would prohibit employers from making distinctions in pay between men and women doing the same jobs unless based on "bona fide" factors other than sex. The PFA also would make compensatory and punitive damages available for violations of the Equal Pay Act and make it easier for employees to bring class action pay discrimination lawsuits. Fortunately for employers, both of these bills got caught behind the eight ball of healthcare, and Congress was unable to enact either bill before the mid-term elections.

Since enough Democrat Senators opposed EFCA, it probably would not have survived a Senate filibuster even before the elections and is surely dead now. In fact, it was not even included on the Democrats' list of priorities for the lame duck session of Congress now under way or the new session that will convene next year. There was some concern that the PFA, which passed the House before the elections, might make it through a lame duck session of the Senate, but those concerns were alleviated when supporters of the bill were unable to muster the 60 votes needed to defeat a Republican-led filibuster just before Thanksgiving. Therefore, the PFA cannot be voted on by the lame duck Senate, which may have been its only chance of passage.

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Among other Democrat-sponsored labor and employment bills that now appear to be in jeopardy is the Protecting America's Workers Act, which would strengthen enforcement and add additional civil and criminal penalties for violations of the Occupational Safety and Health Act (OSHA). While the bill to amend OSHA may yet gain passage, another Democrat-sponsored bill that's now doomed is the so-called Employment Non-Discrimination Act (ENDA), which would prohibit job discrimination based on sexual orientation and gender identity. ENDA has virtually no chance of passage in the new Congress and is unlikely to get any attention in a lame duck session that appears now to be focused almost exclusively on whether to extend the Bush tax cuts.

As indicated above, since it's now unlikely that the President and the Democrats will be able to effect any significant changes impacting the workplace through legislation, the action will shift more to the regulatory arena, where the Democrats can still effect dramatic changes.

IRS/DOL Double Team on Misclassified Workers

Just as the Department of Labor is stepping up its enforcement efforts with regard to the misclassification of non-exempt employees as exempt for overtime purposes under the Fair Labor Standards Act, the Internal Revenue Service (IRS) is getting into the game. Just last month, the IRS announced the allocation of $25 million dollars for the addition of 100 new enforcement agents who will be devoted solely to investigating the misclassification of employees as independent contractors or as exempt for overtime purposes. Why would the IRS be intruding into an area normally under the jurisdiction of the Department of Labor? All the bail outs and economic stimulus legislation have created a huge deficit of unprecedented proportions, and to stem the tide of red ink, the federal government needs money. If employees are misclassified as independent contractors, then the federal government is not getting its cut in the form of payroll taxes. Likewise, if employees who should be classified as non-exempt are not being paid overtime, that's more payroll the IRS could be taxing. Therefore, it behooves employers to look carefully at their independent contractor relationships and their exempt/non-exempt classifications to make sure they'll stand up to scrutiny. Otherwise, you could be risking exposure for hundreds of thousands if not millions of dollars in back pay, taxes, and penalties.

What's Up at the NLRB?

Since the unions won't be getting their way with EFCA, some insiders believe the National Labor Relations Board (NLRB) may change its election rules to make it easier for unions to win. More certain is that the union-dominated Board will issue more and more rulings favorable to unions and employees who want to unionize. Already the NLRB has ruled that firing an employee for posting derogatory comments about their supervisor on Facebook is an unfair labor practice in violation of the National Labor Relations Act. The Board is also expected to issue a ruling invalidating most employer restrictions on employee use of workplace e-mail systems. And just before Thanksgiving, the Board invited "all interested parties" to submit briefs on whether an employer may lawfully deny unions' access to their property for purposes of organizing their employees. Many experts fear, and rightly so, that the Board's action portends a decision establishing a broad right of access by unions to employer property for organizational purposes.

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EEOC's and OFCCP's New Focus

Over at the EEOC, it recently was announced that charges filed in 2010 already had reached an all-time high of nearly 100,000. With the recent amendments to the Americans with Disabilities Act (ADA), we can expect even more charges in 2011, as well as more aggressive enforcement action by the EEOC. The Commission has another powerful motivating factor apart from the recent legislative changes to step up its enforcement of the ADA. It's the same motive the IRS has for investigating the misclassification of independent contractors and exempt employees. The more people with disabilities that the EEOC can get working and off federal assistance, the less red ink flowing out of Washington. For the same reason, the Office of Federal Contract Compliance Programs (OFCCP), which oversees the affirmative action obligations of federal contractors and subcontractors, has made increasing the employment opportunities of veterans and persons with disabilities its new priority. Interesting, from an historical perspective, is that the same dynamic helped drive the passage of the original ADA under a Republican White House and Republican-controlled Congress.

The New Acronym in Town: OMWIs Are Coming

And speaking of federal contractors and sub-contractors, if you do business with any one of more than a dozen federal financial industry regulatory agencies or are regulated by any of these agencies, you have a new set of worries. Hidden in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) is an onerous, broad-reaching catalogue of affirmative action and diversity requirements totally unrelated to the financial crisis the bill was intended to address (see "Financial reform's hidden surprise: diversity requirements," *Louisiana Employment Law Letter,* September 2010). Dodd-Frank requires each of the affected federal financial agencies to establish an Office of Minority and Women Inclusion (OMWI) and to issue regulations by January 21, 2011, to ensure the "fair inclusion" of women and minority employees and women- and minority-owned vendors and contractors by all affected employers. Companies doing business with federal financial agencies also will be required to monitor the hiring and contracting practices of their vendors and contractors. All told, it's estimated that more than 50,000 businesses will be affected.

What Employers Should be Doing Now

If you thought the results of the mid-term elections meant it was time to breathe easier, think again. Now, perhaps more than ever, it's important that employers take stock of all their employment policies, practices, and procedures and take appropriate preventive actions to ensure compliance and minimize the risk of exposure to charges, lawsuits, and agency investigations.

— *H. Mark Adams*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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